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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re A.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.S., Defendant and Appellant.	A158841 (Napa County Super. Ct. No. 20183570002)

A.S. (Minor) appeals a dispositional order placing him on probation. He contends some of the conditions of probation are impermissible under both state and federal law. We shall affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The Napa County District Attorney filed a wardship petition on September 13, 2019, alleging 15-year-old Minor committed false imprisonment (Pen. Code, § 236; count 1), battery on a person with whom he had a dating relationship (Pen. Code, § 243, subd. (e)(1); count 2), and possession of marijuana at school (Health & Saf. Code, § 11357, subd. (d); count 3).

Evidence at the jurisdictional hearing showed Minor was seen on a surveillance camera in his high school. Jane Doe walked up to Minor, then

tried to walk past him. He put his arm on her arm to stop her movement. She again tried to walk by, and he kept his hands on her. She tried to walk around him again, and he stepped in front of her. The last time she tried to walk past him, he had both his hands on her, and he leaned into her with his upper body and moved her backward into a locker room area. The incident lasted about a minute. Jane came out of the locker room by herself, and Minor emerged a few minutes later. Jane told the assistant principal that they had an argument and Minor shoved her.

A school resource officer arrested Minor, searched him, and found marijuana in his pocket. On the way to juvenile hall, Minor spoke with his mother and told her that he and Jane had gotten into an argument and he stepped in front of Jane and held onto her to make sure she did not get away.

Jane testified that at the time of the incident, she and Minor had been dating for about seven months. She walked up to Minor and told him she was going to break up with him, and they got into a fight. She told him she wanted to go back to class, and he "wouldn't let [her] go." He "shoved [her] a bit" and grabbed her by the arms, preventing her from going to class. She was not injured.

Minor testified that he had heard Jane wanted to break up with him, and he wanted to talk with her about it. As they spoke, he held her forearm, and at one point put both his hands on her arms. He was trying to calm her down. She tried to leave, and he tried to keep talking with her. At any point, she could have moved his hand off of her. He denied pushing or shoving her, but acknowledged that they argued.

The juvenile court found insufficient evidence of battery but sustained count 1 as a misdemeanor and count 3 as an infraction.

The dispositional report indicated that "inappropriate drawings" had been found in Minor's room at juvenile hall. Those included drawings of a figure aiming a gun at another figure while saying, "Bitch I got juice"; the other figure's hands were up, and there was a tree in the picture with dollar signs. Underneath was the acronym, "NIBAM," which Minor said meant "Need It By Any Means." One picture contained figures apparently shooting guns at each other, and an acronym for "Self Made Nigga." Another contained the letters "NAPAID" and "Cityoungins," with holes or stars over some letters. Minor said the holes were " 'bullet holes' over the 'n-a' in Napa and 'c-i-t' in City, thus leaving what the minor read as 'paid youngins.' " A figure shooting a gun, with a dollar sign and the word "Juice," was underneath those letters. When asked if "paid youngins" was a group, Minor said it was not.

Minor's mother reported that Minor and a friend had smoked marijuana and consumed alcohol at her house, and she was concerned his friends were a negative influence on him. In August 2019, Minor took his stepfather's truck without permission, although he did not have a driver's license or even a permit. Minor had run away from home on two occasions, for approximately a week each time. During a fight in May 2019, Minor and his mother both grabbed a backpack during an argument; Minor pulled it so hard that it broke her fingers. When staying with his father in the summer of 2019, Minor had damaged the security system as he tried to sneak out of his bedroom window at night, and he was disruptive in the home.

Minor was chronically tardy and truant from school, and he had a grade point average of 1.0. He said he intended to sell the marijuana that was found when he was arrested. In juvenile hall, he primarily associated with youths linked to the Sureño gang.

The court declared Minor a ward and placed him on probation in the home of his mother. Among the terms and conditions of probation were gang conditions and conditions requiring Minor to participate in counseling and an evening reporting center program if required by the probation officer. We will discuss these conditions in greater detail below.

DISCUSSION

I. Gang Conditions

The gang conditions the court imposed are as follows: "14. The minor cannot be a member of any criminal street gang; cannot knowingly participate in any gang activity which advances, benefits, or promotes the actions of a criminal street gang; cannot associate with any person known by the minor to be in a criminal street gang; cannot be at any location known by the minor to be an area where criminal street gang members congregate. . . . [¶] 15. The minor cannot wear or possess any clothing or other item, or display any hand signs known by the minor to have criminal street gang significance."

Minor contends these conditions are improper under California law because they are not reasonably related to his future criminality and that they are unconstitutionally overbroad. We generally review the juvenile court's probation conditions for abuse of discretion, but review constitutional challenges to probation conditions de novo. (*In re J.B.* (2015) 242 Cal.App.4th 749, 754.)

Welfare and Institutions Code section 730, subdivision (b) allows a juvenile court to "impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." The court has broader discretion in fashioning probation conditions for a minor than for an

adult because minors are "deemed to be 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' " (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.)

But the juvenile court's discretion is not boundless. (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 910; *In re J.B.*, *supra*, 242 Cal.App.4th at p. 754.) Under state law, "[a] probation condition is invalid if it ' "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." ' (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) In order to invalidate a condition of probation under the *Lent* test, all three factors must be found to be present." (*In re J.B.*, at p. 754.) The *Lent* test applies to probation conditions for juvenile as well as adults. (*Ibid*.)

Minor first contends the gang conditions are invalid under *Lent*. There is no dispute that the first two prongs of the *Lent* test are satisfied as to at least part of the conditions: Minor's offense was not connected to gang activity or associations, and the gang conditions encompass activities that are not in themselves criminal—for instance, associating with gang members, going to locations where gang members congregate, and wearing clothing associated with gangs. The question before us is whether, to the extent the conditions do not relate to criminal conduct, they are sufficiently connected to preventing Minor from engaging in criminal behavior in the future.

In considering this issue, we must bear in mind that a juvenile court may "consider the minor's entire social history in addition to the circumstances of the crime." (*In re Walter P.* (2009) 170 Cal.App.4th 95, 100; accord, *In re Todd L.* (1980) 113 Cal.App.3d 14, 20–21.) But there must be "more than just an abstract or hypothetical relationship between the

probation condition and preventing future criminality." (*In re Ricardo P.* (2019) 7 Cal.5th 1113, 1121.) Rather, the requirement that a probation condition be " ' "reasonably related to future criminality" ' contemplates a degree of proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition." (*Id.* at p. 1122.)

Such proportionality is present here. Although there was no indication Minor was currently a member of a gang, the record shows that while he was in juvenile hall, he associated primarily with members of the Sureño gang, and he had drawings with images of gun violence connected to money. This occurred against the background of Minor's involvement with alcohol and drugs, possession of marijuana in order to sell it, truancy, running away, taking a truck without permission, and defiance to both his parents. Viewing Minor's social history as a whole, the juvenile court could properly conclude Minor was at risk of falling under the influence of gangs and being led into further criminality and that the gang conditions were reasonably related to preventing this turn of events.

This case is readily distinguishable from *In re Edward B.* (2017) 10 Cal.App.5th 1228, upon which Minor relies. The juvenile court there imposed a gang condition on a minor although there was no evidence either he or his current friends were affiliated with gangs. (*Id.* at p. 1234.) The only possible bases for the gang conditions were the minor's father's statements that one of the minor's former friends had some involvement with a criminal street gang, that he believed an " 'older individual' " had driven the minor before the offense, and that he believed the minor was directed to commit the offense; and the fact that upon being arrested, the minor immediately asked how much time he would have to serve, possibly suggesting sophistication and

planning. (*Ibid*.) Any connection between these facts and gang activity, the Court of Appeal concluded, was speculation, and there was no "reasonable factual nexus" between the gang condition and either the offense or future criminality. (*Id*. at p. 1236.) Here, on the other hand, Minor was currently associating primarily with youth connected to the Sureño street gang while in juvenile hall. That, in conjunction with the troubling pictures found in Minor's room provided the requisite nexus between the condition and deterring Minor from future criminality. The juvenile court was within its discretion in imposing the gang conditions.

Minor contends, however, that even if permissible under *Lent*, the gang conditions impinge on his constitutional right of association and are not narrowly tailored to serve a compelling state interest. He asks us to modify the conditions to specify that they do not forbid casual and incidental contact with known gang members at school, during school-related activities, or during extracurricular activities.

The Attorney General first argues Minor forfeited this point by failing to raise it in the juvenile court. (See *People v. Kendrick* (2014) 226 Cal.App.4th 769, 776–778 [claim that condition was not narrowly tailored to serve significant governmental interest required review of facts underlying convictions, hence forfeited by failure to raise issue in trial court].) But Minor's counsel objected to the "extremely invasive and stringent gang terms being imposed on probation without any clear evidence that [Minor] is a gang member." Although Minor's counsel did not explicitly mention constitutional grounds for his objection, we will treat his objection to the "invasive" terms as preserving the constitutional issue, which we will consider on the merits.

"[C]onditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in

reformation and rehabilitation." (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 910; *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084.) Minor argues the gang terms do not meet this standard because some degree of association with gang members at his school or in his community—for instance, working on a school project, participating in extracurricular activities, or walking to the grocery store—may be necessary and inevitable. He therefore asks us to modify the condition to exclude such "casual and incidental contact" with gang members.

This modification is unnecessary. "When interpreting a probation condition, we rely on 'context and common sense' [citation] and give the condition ' "the meaning that would appear to a reasonable, objective reader." ' " (*In re I.S.* (2016) 6 Cal.App.5th 517, 525, disapproved on another ground in *People v. Adelmann* (2018) 4 Cal.5th 1071, 1078, fn. 10.) The challenged condition requires Minor, a high school student, to refrain from "associat[ing]" with known gang members. No reasonable reader would understand the condition to encompass casual contact with gang members necessitated by their attending the same class at school or boxing in the same Sheriff's Activities League program. Nor would a reasonable person understand that Minor violates the condition if he merely passes by a gang member while walking to the store. But if Minor seeks out the company of, or hangs out informally with, a known gang member then he violates his probation. Interpreted reasonably, the condition is not constitutionally overbroad.

II. Counseling and Evening Reporting Center Programs

Minor also challenges the conditions of probation requiring him to attend counseling and an evening reporting center program if required by the probation officer. He contends that the court improperly delegated its

authority to the probation officer and that the conditions are unreasonable under *Lent*.

The conditions are as follows: "18. The minor attend and complete individual counseling, family counseling, substance abuse counseling, Aggression Replacement Training (ART), Thinking for a Change, and Cognitive Behavior Group at the direction and discretion of the probation officer and not discontinue without the permission of the counselor and the probation officer; [¶] 19. Enroll in and successfully complete the Evening Reporting Center program if required by the Probation Officer. If ordered to participate in the Evening Reporting Center program, you may be placed on GPS monitoring for up to 30 days and you must abide by the rules and regulations of the program and not leave or fail to attend the program without permission from the Probation Officer. While attending the program the minor must be at his/her residence between 6:00 pm and 6:00 am; exceptions to this curfew may be made only at the discretion of the probation officer."

Minor contends these conditions impermissibly delegate to the probation officer authority to determine the terms of his probation. Specifically, he argues, these conditions violate the doctrine of separation of powers because they allow the probation officer, not the juvenile court, to decide whether he should participate in counseling and evening reporting programs. Although Minor did not raise this objection in the juvenile court, we do not treat the point as forfeited because it raises a facial constitutional challenge that can be resolved without consideration of the record developed in the juvenile court. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 889 [facial constitutional challenge not forfeited by failing to raise issue below].)

"It is well settled that courts may not delegate the exercise of their discretion to probation officers." (*In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1372.) Thus, a probation officer may not add new conditions of probation, such as a curfew or a directive to stay out of gang territory. (*Ibid.*) However, a court may properly "dictate the basic policy of a condition of probation, leaving specification of details to the probation officer." (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 919.) The rule of separation of powers has been interpreted to allow delegation of authority " 'so long as (1) the exercise thereof is incidental or subsidiary to a function or power otherwise properly exercised by such department or agency, and (2) the department to which the function so exercised is primary retains some sort of ultimate control over its exercise, as by court review in the case of the exercise of a power judicial in nature.' " (*In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1236.)

The defendant in *People v. Penoli* (1996) 46 Cal.App.4th 298, 307–310 (*Penoli*) made a similar challenge to a condition granting the probation department authority to select a residential drug treatment program and determine whether she had successfully completed it. The Court of Appeal upheld the condition against a challenge that it was an unlawful delegation of judicial authority. In so doing, the court explained that "any attempt to specify a particular program at or prior to sentencing would pose serious practical difficulties. The trial court is poorly equipped to micromanage selection of a program, both because it lacks the ability to remain apprised of currently available programs and, more fundamentally, because entry into a particular program may depend on mercurial questions of timing and availability." (*Id.* at p. 308.)

Minor seeks to distinguish this case from *Penoli* on the ground that the probation officer here has "unfettered authority" to decide whether Minor

must participate in one of multiple counseling programs or the evening service center program. But we do not read the discretion granted to the probation officer as broadly as Minor does—that is, to decide whether Minor should participate in any counseling or other programs at all. The conditions require Minor to participate in counseling and/or other programs, specify the types of programs, and leave to the probation officer the choice of which programs Minor should attend. Any constellation of the listed programs appears to be authorized by these conditions, but if the probation officer seeks to have Minor take part in programs that he believes are inappropriate, he may seek to have the order changed. (Welf. & Inst. Code, § 778, subd. (a); see *Penoli*, *supra*, 46 Cal.App.4th at p. 308.)

Minor argues a different result is necessary under *People v. Cervantes* (1984) 154 Cal.App.3d 353, 357–358, which invalidated a condition that the defendant pay restitution in an amount and manner determined by the probation officer. But here, the issue is not the amount of restitution—a matter that statutory law left to the court, and as to which a defendant had a right to present evidence, respond to an adverse ruling, and have the court consider his ability to pay. (*Ibid*.) Nor do *In re Shawna M.* (1993) 19 Cal.App.4th 1686, 1690 or *In re Danielle W.*, *supra*, 207 Cal.App.3d at p. 1237 assist Minor. Each of those cases involved visitation between parent and child during a dependency proceeding. They are of limited assistance in considering the application of the probation condition before us here.

Minor also points to *People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1354–1355, which found overbroad a probation condition prohibiting the defendant from associating " 'with any person, as designated by your probation officer.' " That condition provided no limits to the people the probation officer could prohibit the defendant from contacting, even if the

prohibition would have no relationship to the state's interest in reforming him. (*Id*. at p. 1358.) The appellate court explained that a "court may leave to the discretion of the probation officer the specification of the many details that invariably are necessary," as long as the court's order is not "entirely open-ended" but contains a "standard by which the probation department is to be guided." (*Id*. at pp. 1358–1359.) The same problem does not exist here. The juvenile court's specification of the various types of programs Minor might participate in provides sufficient guidance.

The fact that condition 19 leaves open whether Minor must enroll in the evening reporting center does not change this conclusion. It appears to be one of many possible programs available to assist Minor in his rehabilitation, and the probation officer could properly be entrusted to determine whether to require it, or to rely on other available programs.

Minor also argues the counseling and evening reporting center conditions are improper under *Lent* because there is no nexus between the conditions and his future criminality. However, he did not object to the condition on this basis in the juvenile court. We cannot evaluate his contention without reference to the record developed in the juvenile court, and hence it is forfeited by his failure to raise it below. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 889; *People v. Welch* (1993) 5 Cal.4th 228, 230, 236; *In re L.O.* (2018) 27 Cal.App.5th 706, 712.)

Anticipating this problem, Minor argues in the alternative that his counsel rendered constitutionally ineffective assistance by failing to object to the condition on *Lent* grounds. To demonstrate ineffective assistance, Minor must show counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability the result of the proceeding would have been different absent

counsel's unprofessional errors. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) And where, as here, the issue is raised on direct appeal, the record must show the lack of a rational tactical purpose for the challenged act or omission. (*Ibid.*)

This record comes far from meeting that standard. Bearing in mind Minor's history of being truant, running away, taking a truck, defying his parents, and using alcohol and marijuana, as well as the offense he committed against Jane Doe, counsel could reasonably have concluded that it would be futile to object to conditions requiring Minor to engage in counseling, participate in the evening reporting center program, and stay off the streets at night. Minor has only a few more years to make the most of his free public education, and these probation conditions are all designed to reorient him toward taking advantage of that opportunity and preparing for a law-abiding adulthood.

DISPOSITION

The dispositional order is affirmed.

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TUCHER, J.

WE CONCUR:

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POLLAK, P. J.

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STREETER, J.

In re A.S. (A158841)